



IN THE MATTER OF

V.

and

Docket No: AP 2019-0940

J. Ader (“Requester”) submitted a request (“Request”) to the City of Harrisburg (“City”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking information regarding its use of CRIMEWATCH Technologies, Inc. (“Crimewatch”) services. The City produced certain records but denied the Request for manuals as implicating trade secrets. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **denied**, and the City is not required to take any further action.

FACTUAL BACKGROUND

On May 2, 2019, the Request was filed, seeking, in relevant part: “Any/all manuals regarding CRIMEWATCH Technologies products/services.”¹ On June 6, 2019, following a thirty-day extension to respond, 65 P.S. § 67.902, the City produced several responsive records, but denied the Request for manuals, arguing that the responsive records contain confidential proprietary information and/or trade secrets. 65 P.S. § 67.708(b)(11).

On June 18, 2019, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the City to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On June 28, 2019, Crimewatch submitted a request to participate before the OOR, along with a position statement arguing, among other things, that the Crimewatch materials possessed by the City contain trade secrets and confidential proprietary information.² In support of these arguments, Crimewatch submitted the affidavit of Mike Grucz, the Chief Technology Officer of Crimewatch, who attests that Crimewatch’s market is competitive, that the information sought is kept secret, that it has great value to Crimewatch, that the only responsive materials are quick reference cards embedded into the platform itself, and that the City does not have access to these cards.

The same day, the City submitted a position statement, relying on Crimewatch’s arguments and noting that the City does not possess any responsive records.³ In support of this argument, the City submitted the verification of Tamara Life, then the City’s Agency Open Records Officer, who

¹ Although the Request contained five parts, the Requester only seeks to appeal the fifth part. Therefore, the remainder of the Request is not reproduced in this Final Determination.

² Crimewatch’s request to participate was not opposed by any party and is granted.

³ The City explains on appeal that it conducted a search for records and located none, but chose to rely upon Crimewatch’s request that it deny the request for manuals because “any manuals that may be in possession of the [C]ity were exempt from disclosure under §708(b)(11)[.]”

attests that she conducted an examination of the files in the Bureau of Police for responsive records, but learned that Crimewatch had never provided the City with a manual.

On July 22, 2019, in response to an inquiry from the OOR, the City submitted the verification of Jacquallynn Stockholm, a Crime Analyst with the City's police department, who attests that the City uses the platform for public reporting, public posting of community events, solicitation for tips from the public, to provide links to other resources to the public, and to provide the City with a crime map and a registry of private security cameras.

The same day, Crimewatch submitted the affidavit of Matthew Bloom, the President and CEO of Crimewatch, who attests that the responsive reference cards are only available during the initial 30-day online training process, which the City never underwent because it joined as a customer prior to the creation of the training program.

On August 2, 2019, in response to another inquiry by the OOR, Crimewatch submitted another position statement and the supplemental affidavit of Matthew Bloom, who attested that the City could theoretically pay for limited access to the reference materials at issue but had not done so. The same day, the City submitted a response to the OOR's inquiry, explaining that it did not have a written contract with Crimewatch, and that the invoice submitted best demonstrated the terms of the agreement.

LEGAL ANALYSIS

"The objective of the Right to Know Law ... is to empower citizens by affording them access to information concerning the activities of their government." *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012). Further, this important open-government law is "designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their

actions.” *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff’d* 75 A.3d 453 (Pa. 2013).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required “to review all information filed relating to the request” and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The law also states that an appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id.* The decision to hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Pa. Dep’t of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, neither party sought a hearing; however, the OOR has the requisite information and evidence before it to properly adjudicate the matter.

The City is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in possession of a local agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: “(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the

evidence.” 65 P.S. § 67.708(a)(1). Preponderance of the evidence has been defined as “such proof as leads the fact-finder ... to find that the existence of a contested fact is more probable than its nonexistence.” *Pa. State Troopers Ass’n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Pa. Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)). “The burden of proving a record does not exist ... is placed on the agency responding to the right-to-know request.” *Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

The City argues that no responsive records exist. In support of this argument, the City provided the verification of Tamara Life, who attests that she conducted a search of the City’s Bureau of Police records and located no responsive manuals and had discovered that Crimewatch had never provided any. This attestation is further supported by the affidavit of Mike Grucz, Crimewatch’s Chief Technology Officer, who attests that the only training manuals responsive to the Request are quick reference cards for the product, which the City does not have access to.

Under the RTKL, a verification made under the penalty of perjury may serve as sufficient evidentiary support. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any evidence that the City has acted in bad faith or that additional responsive records exist, “the averments in [the verification] should be accepted as true.” *McGowan v. Pa. Dep’t of Env’tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)). Based on the evidence provided, the City has met its burden of proving that it does not possess the requested manuals. *See Hodges*, 29 A.3d at 1192.

The OOR's inquiry does not end with documents in the City's possession. Public records in the possession of third parties are accessible through Section 506(d) of the RTKL. *See Dental Benefit Providers, Inc. v. Eiseman*, 86 A.3d 932, 938-39 (Pa. Commw. Ct. 2014) (citing *Honaman v. Lower Merion Twp.*, 13 A.3d 1014 (Pa. Commw. Ct. 2011)), *aff'd by*, 124 A.3d 1214 (2015). Section 506(d)(1) of the RTKL provides that:

A public record that is not in the possession of an agency but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the agency, and which directly relates to the governmental function and is not exempt under this act, shall be considered a public record of the agency...

65 P.S. § 67.506(d)(1). “Under the RTKL, to reach records outside an agency’s possession the following two elements must be met: (1) the third party performs a governmental function on behalf of the agency; and (2) the information sought directly relates to the performance of that function.” *Eiseman*, 86 A.3d at 939 (citations omitted).

The City has a contract with Crimewatch, whereby Crimewatch provides the City with a web portal which “standardizes where the public accesses public safety information and submits information to law enforcement.⁴ Law enforcement users can efficiently distribute information to multiple touch points with a single entry. The platform provides for real-time engagement with the public 24/7.” Crimewatch further explains that it gives the City tools for synchronizing its media presence and directing public interactions. In her July 22, 2019 verification, Jacquallynn Stockholm also attests that the City uses the platform to solicit and receive tips from the public, to

⁴ In response to the original Request, and again on appeal, the City confirmed that it has no written contract with Crimewatch. However, no party argues that the City and Crimewatch do not have a working contract for the purposes of Section 506(d). *See, e.g., Dental Benefit Providers v. Eiseman*, 124 A.3d 1214 (Pa. 2014) (Holding that an “actual contract” is a prerequisite to access under Section 506(d) of the RTKL). Furthermore, the OOR has previously determined that an unwritten contract is a valid contract for the purposes of Section 506(d) of the RTKL. *Drack v. Penn Twp.*, OOR Dkt. AP 2015-0249, 2015 PA O.O.R.D. LEXIS 330.

keep a “crime map” tracking incidents throughout the region, and to keep track of registered private security cameras.

Officers of the City’s Bureau of Police are empowered by the Third Class City Code to “enforce the laws of this Commonwealth”, and may investigate offenses “which the officer views or otherwise has probable cause to believe was committed within his jurisdiction” or “preserve, protect or defend persons or property or to otherwise maintain the peace and dignity of this Commonwealth.” 11 Pa.C.S. § 12005; 42 Pa.C.S. § 8952. Tools used by the City to help officers organize and conduct such investigations are a core part of the City’s mission. *See Broadus v. City of Pittsburgh & Carnegie Mellon University*, OOR Dkt. 2018-0118, 2018 PA O.O.R.D. LEXIS 569. Therefore, Crimewatch’s functions related to the receipt of tips, the creation of “crime maps” and registration of private security cameras constitute “some substantial facet of the agency’s role and responsibilities, as opposed to entry into routine service contracts.” *SWB Yankees LLC.*, 45 A.3d at 1043; *See also, e.g., Municipality of Monroeville v. Drack*, No. 2123 C.D. 2012, 2013 Pa. Commw. Unpub. LEXIS 561 (Pa. Commw. Ct. 2013) (determining that certifying speed testing devices was a non-ancillary government function because those devices had to be accurate to allow the government to obtain convictions).⁵

However, Crimewatch notes that the City has never had access to nor made use of the reference cards responsive to the Request. Matthew Bloom, the President of Crimewatch, attests that “The reference cards are only available as part of the online training process and are available for 30 days during onboarding. However, Harrisburg Police Department didn’t have these because when they joined as a client, [Crimewatch] did not have formal training or training materials; they were one of [Crimewatch’s] first customers.”

⁵ An unpublished opinion of the Commonwealth Court may be cited for its persuasive value. 210 Pa. Code § 69.414.

As the Commonwealth Court has noted, “the direct relationship [between a record and governmental function] must pertain to the *performance* of the governmental function.” *UnitedHealthcare of Pa., Inc. v. Baron*, 171 A.3d 943, 963 (citing *Allegheny County Dep’t of Admin. Servs. v. Parsons*, 61 A.3d 336 (Pa. Commw. Ct. 2017)) (emphasis in original). The fact that an agency does not have access to records under its contract with a third party does not necessarily disqualify the records from being provided under Section 506(d) of the RTKL. *See Parsons*, 61 A.3d at 346; *Equity Forward v. Dep’t of Human Servs.*, 2019 Pa. Commw. Unpub. LEXIS 292 (“[I]t would undermine the clear aim of [Section 506(d) of the RTKL] to require that [] the materials actually be ‘of such agency’ in the first instance.”) (quoting *SWB Yankees*, 45 A.3d at 1044). However:

Section 506(d) prescribes more restricted access precisely because it applies to private entities. Section 506(d) does not reach all records in possession of a private contractor that relate to the governmental function; rather, the records reached are only those that relate to *performance of* that function. . . . This finely drawn distinction is critical to properly analyzing and applying the provision.

Id. Here, Crimewatch’s performance of a governmental function consists of the provision of its digital platform to the City. As Mr. Bloom attests:

If the Harrisburg Police Department (“HPD”) hires someone new and the HPD wants the new hire to learn how to use the [Crimewatch] platform, the HPD could theoretically purchase additional online training and would have access to the quick reference cards during the 30-day training period, but not afterwards [...] However, HPD does not need to purchase any training materials from [Crimewatch] and, in fact, has not purchased any training materials from [Crimewatch] because its existing users can effectively train new hires and new users how to use the system without any online training materials and quick reference cards. As such, HPD has not spent any public funds on the requested training materials.

Therefore, the training materials have not been part of Crimewatch’s provision of the platform to the City, and they are not directly related to Crimewatch’s performance of a governmental function. Because the City has never purchased or used the training materials, they

have had no bearing on the City's use of the platform for any of its governmental purposes. *See also Highmark Inc. v. Voltz*, 163 A.3d 485, 495 (Pa. Commw. Ct. 2017). Furthermore, because the City has not purchased the training materials and is not entitled to them under its present arrangement with Crimewatch, the materials do not "document a transaction or activity" of the City. *See* 65 P.S. § 67.102 (definition of a "record"); *W. Chester Univ. of Pa. v. Browne*, 71 A.3d 1064 (Pa. Commw. Ct. 2013) ("Because Contractor's benefits plan is not a "record" under Section 102 of the Right-to-Know Law ... *a fortiori*, it is not a "public record" under Section 506(d)(1) ..."); *but see UnitedHealthcare of Pa., Inc. v. Baron*, 171 A.3d 943 (Pa. Commw. Ct. 2017) ("The RTKL provides access to records that do not qualify as a "record" of an agency through Section 506(d)(1) of the RTKL ...). Therefore, the City has demonstrated that the responsive reference cards are not in its possession, custody, or control, and the records are not directly related to Crimewatch's governmental function under Section 506(d) of the RTKL.

CONCLUSION

For the foregoing reasons, Requester's appeal is **denied**, and the City is not required to take any further action. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Dauphin County Court of Common Pleas. 65 P.S. § 67.1302(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond as per Section 1303 of the RTKL. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.⁶ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

⁶ *See Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

FINAL DETERMINATION ISSUED AND MAILED: August 5, 2019

/s/ Jordan Davis

APPEALS OFFICER
JORDAN C. DAVIS

Sent to: J Ader (via email);
Isaac Gaylord, Esq. (via email);
Terence Barna, Esq. (via email)